(b)(6)

**U.S. Department of Homeland Security**
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

**U.S. Citizenship and Immigration Services**

DATE: OCT 0 6 2014 Office: TEXAS SERVICE CENTER FILE:

IN RE: Petitioner:
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as an Alien of Extraordinary Ability Pursuant to Section 203(b)(1)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(1)(A)

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at http://www.uscis.gov/forms for the latest information on fee, filing location, and other requirements.** *See also* 8 C.F.R. § 103.5. **Do not file a motion directly with the AAO.**

Thank you,

Ron Rosenberg
Chief, Administrative Appeals Office

**DISCUSSION:** The Director, Texas Service Center, denied the employment-based immigrant visa petition on January 17, 2014. On February 19, 2014, the petitioner filed a motion to reopen and a motion to reconsider. The director reopened the matter and reaffirmed the original decision. The matter is now before the AAO on appeal. The appeal will be dismissed.

The petitioner seeks classification as an "alien of extraordinary ability" in the sciences as a research associate, pursuant to section 203(b)(1)(A) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(A). The director determined the petitioner had not established the sustained national or international acclaim necessary to qualify for classification as an alien of extraordinary ability.

Congress set a very high benchmark for aliens of extraordinary ability by requiring through the statute that the petitioner demonstrate the alien's "sustained national or international acclaim" and present "extensive documentation" of the alien's achievements. *See* section 203(b)(1)(A)(i) of the Act and 8 C.F.R. § 204.5(h)(3). The implementing regulation at 8 C.F.R. § 204.5(h)(3) states that an alien can establish sustained national or international acclaim through evidence of a one-time achievement of a major, internationally recognized award. Absent the receipt of such an award, the regulation outlines ten categories of specific objective evidence. 8 C.F.R. § 204.5(h)(3)(i) through (x). The petitioner must submit qualifying evidence under at least three of the ten regulatory categories of evidence to establish the basic eligibility requirements.

On appeal, the petitioner submits a brief. The appeal must address the director's most recent decision which concluded: "USCIS has carefully reviewed the above letters of support, as well as the other submitted letters on the petitioner's behalf," and that "the initial evidence was properly considered." In addition, both of the director's decisions correctly informed the petitioner that evidence which references events which occur after the time of filing, including the additional citations referenced by the petitioner, cannot be considered. Eligibility must be established at the time of filing. 8 C.F.R. § 103.2(b)(1), (12). A petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. *Matter of Izummi,* 22 I&N Dec. 169, 175 (Comm'r 1998). That decision further provides, citing *Matter of Bardouille,* 18 I&N Dec. 114 (BIA 1981), that USCIS cannot "consider facts that come into being only subsequent to the filing of a petition." *Id.* at 176. A petition may not be approved if the beneficiary or the self-petitioner was not qualified at the priority date. *See Matter of Katigbak,* 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971); *see also Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg'l Comm'r 1978) regarding nonimmigrant petitions. *Matter of Wing's Tea House,* 16 I&N Dec. 158, 160 (Reg'l Comm'r 1977) emphasizes the importance of not obtaining a priority date prior to being eligible, based on future experience. This follows the policy of preventing affected parties from securing a priority date in the hope that they will subsequently be able to demonstrate eligibility. In fact, this principle has been extended beyond an alien's eligibility for the classification sought. For example, an employer must establish its ability to pay the proffered wage as of the date of filing. *See Matter of Great Wall,* 16 I&N Dec. 142, 144-145 (Act. Reg'l Comm'r 1977), which provides that a petition should not become approvable under a new set of facts.

The petitioner's brief generally repeats the claims made in the prior motion regarding his eligibility for the classification, including the new evidence filed. Notwithstanding the above, for the reasons discussed below, the record supports the director's conclusion that the petitioner has not established eligibility for the exclusive classification sought.

## I. LAW

Section 203(b) of the Act states, in pertinent part, that:

> (1) Priority workers. -- Visas shall first be made available . . . to qualified immigrants who are aliens described in any of the following subparagraphs (A) through (C):
>
> > (A) Aliens with extraordinary ability. -- An alien is described in this subparagraph if --
> >
> > > (i) the alien has extraordinary ability in the sciences, arts, education, business, or athletics which has been demonstrated by sustained national or international acclaim and whose achievements have been recognized in the field through extensive documentation,
> > >
> > > (ii) the alien seeks to enter the United States to continue work in the area of extraordinary ability, and
> > >
> > > (iii) the alien's entry into the United States will substantially benefit prospectively the United States.

U.S. Citizenship and Immigration Services (USCIS) and legacy Immigration and Naturalization Service (INS) have consistently recognized that Congress intended to set a very high standard for individuals seeking immigrant visas as aliens of extraordinary ability. *See* H.R. 723 101st Cong., 2d Sess. 59 (1990); 56 Fed. Reg. 60897, 60898-99 (Nov. 29, 1991). The term "extraordinary ability" refers only to those individuals in that small percentage who have risen to the very top of the field of endeavor. *Id.*; 8 C.F.R. § 204.5(h)(2).

The regulation at 8 C.F.R. § 204.5(h)(3) requires that the petitioner demonstrate the alien's sustained acclaim and the recognition of his or her achievements in the field. Such acclaim must be established either through evidence of a one-time achievement (that is, a major, international recognized award) or through the submission of qualifying evidence under at least three of the ten categories of evidence listed at 8 C.F.R. § 204.5(h)(3)(i)-(x).

In 2010, the U.S. Court of Appeals for the Ninth Circuit (Ninth Circuit) reviewed the denial of a petition filed under this classification. *Kazarian v. USCIS*, 596 F.3d 1115 (9th Cir. 2010). Although the court upheld the AAO's decision to deny the petition, the court took issue with the AAO's evaluation

of evidence submitted to meet a given evidentiary criterion.[1] With respect to the criteria at 8 C.F.R. § 204.5(h)(3)(iv) and (vi), the court concluded that while USCIS may have raised legitimate concerns about the significance of the evidence submitted to meet those two criteria, those concerns should have been raised in a subsequent "final merits determination." *Id.* at 1121-22.

The court stated that the AAO's evaluation rested on an improper understanding of the regulations. Instead of parsing the significance of evidence as part of the initial inquiry, the court stated that "the proper procedure is to count the types of evidence provided (which the AAO did)," and if the petitioner failed to submit sufficient evidence, "the proper conclusion is that the applicant has failed to satisfy the regulatory requirement of three types of evidence (as the AAO concluded)." *Id.* at 1122 (citing to 8 C.F.R. § 204.5(h)(3)).

While the petitioner is correct that *Kazarian* sets forth a two-part approach where the evidence is first counted, the director did not "fail[] to make an adequately detailed analysis…based on the totality of [the petitioner]'s evidentiary record," as claimed by the petitioner, because the petitioner had not met at least three of the regulatory criteria. In this matter, we will review the evidence under the plain language requirements of each criterion claimed. As the petitioner did not submit qualifying evidence under at least three criteria, the proper conclusion is that the petitioner has failed to satisfy the antecedent regulatory requirement of three types of evidence. *Id.*

## II. ANALYSIS

### A. Evidentiary Criteria[2]

The director found that the petitioner satisfied the criteria at 8 C.F.R. § 204.5(h)(3)(iv) and (vi) and the record supports the director's findings. Specifically, the petitioner reviewed manuscripts for the and authored several scholarly articles. In light of the above, the only remaining criterion is 8 C.F.R. § 204.5(h)(3)(v), which will be discussed below.

> *Evidence of the alien's original scientific, scholarly, artistic, athletic, or business-related contributions of major significance in the field.*

On motion and on appeal, the petitioner asserts that it was an abuse of the director's discretion to quote from only three of the seven recommendation letters submitted. Both of the director's decisions, however, indicate that all of the letters were considered. The director's most recent decision stated that "[t]hese letters explain the background and achievements of the petitioner" and that they "establish[] the petitioner has made first time discoveries, and has conducted original

[1] Specifically, the court stated that the AAO had unilaterally imposed novel substantive or evidentiary requirements beyond those set forth in the regulations at 8 C.F.R. § 204.5(h)(3)(iv) and 8 C.F.R. § 204.5(h)(3)(vi).

[2] The petitioner does not claim to meet or submit evidence relating to the regulatory categories of evidence not discussed in this decision.

research; however, these letters failed to establish these original contributions are considered [] [to be of] major significance." The decision further states that "[t]he evidence does not demonstrate how the petitioner's field has changed as a result of the work beyond the incremental improvements in knowledge and understanding expected from valid original research." The plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(v) requires "[e]vidence of the alien's original scientific, scholarly, artistic, athletic, or business-related contributions of major significance in the field." Here, the evidence must rise to the level of original contributions "of major significance in the field." The phrase "major significance" is not superfluous and, thus, it has some meaning. *Silverman v. Eastrich Multiple Investor Fund, L.P.*, 51 F. 3d 28, 31 (3rd Cir. 1995) *quoted in APWU v. Potter*, 343 F.3d 619, 626 (2nd Cir. Sep 15, 2003). Contributions must be documented and rise to the level of original scientific-related contributions "of major significance in the field." *See Visinscaia v. Beers*, --- F. Supp. 2d ---, 2013 WL 6571822, at *6, 8 (D.D.C. Dec. 16, 2013) (upholding a finding that a ballroom dancer had not met this criterion because she did not demonstrate her impact in the field as a whole).

Regarding the petitioner's published articles as evidence to meet this criterion, the regulations contain a separate criterion regarding the authorship of scholarly articles. 8 C.F.R. § 204.5(h)(3)(vi). Evidence relating to or even meeting the scholarly articles criterion is not presumptive evidence that the petitioner also meets this criterion. To hold otherwise would render meaningless the regulatory requirement that a petitioner meet at least three separate criteria. Publications and presentations are not sufficient evidence under 8 C.F.R. § 204.5(h)(3)(v) absent evidence that they were of "*major* significance." *Kazarian,* 580 F.3d 1030, 1036 (9th Cir. 2009) *aff'd in part* 596 F.3d 1115. In 2010, the *Kazarian* court reaffirmed its holding that the AAO did not abuse its discretion in finding that the alien had not demonstrated contributions of major significance. 596 F.3d at 1122. Futhermore, the simple fact that the petitioner's findings have been published does not create a presumption that the findings, upon dissemination in the field, impacted the field, or are otherwise original contributions of major significance. The petitioner's field, like most science, is research-driven, and there would be little point in publishing research that did not add to the general pool of knowledge in the field.

On appeal, the petitioner repeats verbatim from the motion to reopen and motion to reconsider regarding the excerpts from the reference letters submitted. In general, the letters focus on the petitioner's skills, research projects and potential to benefit the United States in the future. Some of the letters identify the petitioner's research results and conclude they are applicable to other work in the field or even constitute contributions to the field, but they do not explain how the petitioner's results have had a major impact on the field. Vague, solicited letters from local colleagues that do not specifically identify contributions or provide specific examples of how those contributions influenced the field are insufficient. *Kazarian v. USCIS,* 580 F.3d 1030, 1036 (9th Cir. 2009) *aff'd in part* 596 F.3d 1115 (9th Cir. 2010).[3] The ten regulatory criteria at 8 C.F.R. § 204.5(h)(3) reflect the statutory demand for "extensive documentation" in section 203(b)(1)(A)(i) of the Act.

[3] In 2010, the *Kazarian* court reiterated that the AAO's conclusion that "letters from physics professors attesting to [the alien's] contributions in the field" were insufficient was "consistent with the relevant regulatory language." 596 F.3d at 1122.

Dr. , an Associate Professor and Co-Director of the Hematopathology Section in the Department of Pathology and Laboratory Medicine of , states that the petitioner's work in his lab "will greatly facilitate our future work in the therapy of based nanomedicine and in monitoring and pursuing the therapeutic response of this category of cancers." He further states that the petitioner "created a reliable, time and money-saving method which is worth popularizing because such a method can be used in a clinical lab for daily diagnosis to detect different types of cancers once more cancer-specific aptamer are developed." Dr. also notes that the petitioner "facilitated" Dr. 2010 grant from the and the petitioner's "critical findings…will greatly benefit my further application for academic grants in the field of lymphoma research." In addition, Dr. states that the petitioner's "work was even implemented by Dr. group from in their research on ALCL."

Dr. Director of the Section of Hamatopathology and a Professor in the Department of Pathology at the states that she "implemented [the petitioner]'s notable conditional inhibition system" for a paper she published in , the petitioner and Dr. are three of the authors of the paper. That the petitioner's co-authors continue to build on their collaborative research is not indicative of a wider impact on the field. Regarding his work on cell staining," Dr. states that "[h]is unique skill in this new method will greatly benefit the field in using aptamer for the detection and diagnosis of some special categories of clinical paraffin-embedded cancer samples."

Dr. Director of the states that "clinical applications [of the petitioner's findings regarding could greatly benefit cancer patients." He further states that the petitioner's work "is an important step in translating the research to clinical application which may improve the therapy of ."

Dr. Director, states that one of the petitioner's "finding[s] could be used for reference in our animal model of virotherapy for cancers…in order to enhance the efficacy of destroying xenograft cancers in mice."

Dr. Assistant Professor, Laboratory Medicine, at the states that the petitioner's "work is…of high quality and…is focused on important scientific problems with substantial potential for clinical impact." He further states that he "is not aware of any other large academic laboratories that have published significant articles concerning potential applications of aptamers in clinical pathology," except for his own lab and the petitioner's at He also states "that aptamer technologies hold great promise for the future of medicine."

Dr. Director and Professor of the states that the petitioner's work with the parasite ".could especially impact the people who live in epidemic regions to change their living behaviors" and that

his work on "fill[ing] in the blanks to fully describe and explain" clear cell ondontogenic carcinoma "will allow researchers to be able to more precisely and accurately craft treatments and therapies." He also states that the petitioner's work on anaplastic large cell lymphoma "shows potential practical application in clinical detection and new therapy for" the disease. Dr. concludes that the petitioner's "novel and innovative skills will greatly impact and allow for the use of aptamer in clinical applications for the diagnosis of lymphoma and other cancers and in the establishment of a new approach to lymphoma gene therapy by a cell-specific nanomedicine delivery system."

Dr. Professor and Director of the at , discusses the petitioner's research history and states that the petitioner's findings with regard to his research on aptamers "are so significant" because "aptamers are likely to have a broad use in the future in clinical applications."

The Board of Immigration Appeals (BIA) has stated that testimony should not be disregarded simply because it is "self-serving." *See, e.g., Matter of S-A-*, 22 I&N Dec. 1328, 1332 (BIA 2000) (citing *Matter of M-D-*, 21 I&N Dec. 1180 (BIA 1998); *Matter of Y-B-*, 21 I&N Dec. 1136 (BIA 1998); *Matter of Dass*, 20 I&N Dec. 120 (BIA 1989); see also *Matter of Acosta*, 19 I&N Dec. 211, 218 (BIA 1985)). The Board clarified, however: "We not only encourage, but require the introduction of corroborative testimonial and documentary evidence, where available." *Matter of S-A-*, 22 I&N Dec. at 1332. If testimonial evidence lacks specificity, detail, or credibility, there is a greater need for the petitioner to submit corroborative evidence. *Matter of Y-B-*, 21 I&N Dec. at 1136.

The opinions of experts in the field are not without weight and are considered above. While such letters can provide important details about the petitioner's skills, they cannot form the cornerstone of a successful extraordinary ability claim. USCIS may, in its discretion, use as advisory opinions statements submitted as expert testimony. *See Matter of Caron International*, 19 I&N Dec. at 795. However, USCIS is ultimately responsible for making the final determination regarding an alien's eligibility for the benefit sought. *Id.* The submission of letters from experts supporting the petition is not presumptive evidence of eligibility; USCIS may evaluate the content of those letters as to whether they support the alien's eligibility. *See id.* at 795; *see also Matter of V-K-*, 24 I&N Dec. 500, n.2 (BIA 2008) (noting that expert opinion testimony does not purport to be evidence as to "fact" but rather is admissible only if it will assist the trier of fact to understand the evidence or to determine a fact in issue).

While the petitioner's research is no doubt of value, it can be argued that any research must be shown to be original and present some benefit if it is to receive funding and attention from the scientific community. Research, in order to be accepted for publication, must offer new and useful information to the pool of knowledge. It does not follow that every researcher who performs original research that adds to the general pool of knowledge has inherently made a contribution of major significance to the field as a whole. While the record includes numerous attestations of the potential impact of the petitioner's work and some even affirm contributions to the field, the evidence falls short of establishing that the petitioner had already made contributions of major significance. The assertions that the petitioner's research results are likely to be influential is not adequate to establish

that his findings are already recognized as major contributions in the field. Eligibility must be established at the time of filing. 8 C.F.R. §§ 103.2(b)(1), (12); *Matter of Katigbak*, 14 I&N Dec. at 49. Thus, the petitioner's contributions must already be of major significance as of that date.

Regarding the petitioner's citations, while documenting some interest in the petitioner's work, the citations do not establish an impact consistent with a contribution of major significance. Furthermore, many of the citations in the record often merely cite to the petitioner's work as one of multiple articles for background information and many of the citations occurred after the date of filing, and therefore cannot be considered here. *Id.* At the time of filing, the petitioner demonstrated a number of citations in the aggregate; however, these citations do not demonstrate the impact of any one article. Individually, the petitioner has documented one moderately cited article and other minimally cited articles, which are not probative of a major contribution in the field as required by the plain language of the regulation.

In light of the above, the petitioner has not submitted qualifying evidence under this criterion.

### C. Summary

The petitioner has failed to satisfy the antecedent regulatory requirement of three types of evidence.

## IV. CONCLUSION

The documentation submitted in support of a claim of extraordinary ability must clearly demonstrate that the alien has achieved sustained national or international acclaim and is one of the small percentage who has risen to the very top of the field of endeavor.

Had the petitioner submitted the requisite evidence under at least three evidentiary categories, in accordance with the *Kazarian* opinion, the next step would be a final merits determination that considers all of the evidence in the context of whether or not the petitioner has demonstrated: (1) a "level of expertise indicating that the individual is one of that small percentage who have risen to the very top of the[ir] field of endeavor" and (2) "that the alien has sustained national or international acclaim and that his or her achievements have been recognized in the field of expertise." 8 C.F.R. §§ 204.5(h)(2) and (3); *see also Kazarian,* 596 F.3d at 1119-20. While we conclude that the evidence is not indicative of a level of expertise consistent with the small percentage at the very top of the field or sustained national or international acclaim, we need not explain that conclusion in a final merits determination.[4] Rather, the proper conclusion is that the petitioner has failed to satisfy the antecedent regulatory requirement of three types of evidence. *Id.* at 1122.

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[4] The AAO maintains de novo review of all questions of fact and law. *See Soltane v. DOJ, 381 F.3d 143, 145 (3d Cir. 2004).* In any future proceeding, the AAO maintains the jurisdiction to conduct a final merits determination as the office that made the last decision in this matter. 8 C.F.R. § 103.5(a)(1)(ii). *See also* section 103(a)(1) of the Act; section 204(b) of the Act; DHS Delegation Number 0150.1 (effective March 1, 2003); 8 C.F.R. § 2.1 (2003); 8 C.F.R. § 103.1(f)(3)(iii) (2003); *Matter of Aurelio*, 19 I&N Dec. 458, 460 (BIA 1987) (holding that legacy INS, now USCIS, is the sole authority with the jurisdiction to decide visa petitions).

The petitioner has not established eligibility pursuant to section 203(b)(1)(A) of the Act and the petition may not be approved.

The appeal will be dismissed for the above stated reasons, with each considered as an independent and alternate basis for the decision. In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

**ORDER:** The appeal is dismissed.